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## Refugee Discrimination – The Good, the Bad, and the Pragmatic

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**ABSTRACT** *This article addresses three questions. To what extent does the current refugee regime discriminate among refugees? When is such discrimination wrong? Could discrimination ever be justified pragmatically, for the sake of admitting more refugees given political constraints? In answer to the first question, it finds discrimination is rampant. There is the kind of discrimination that gets noticed: discrimination that states choose to enact within the refugee regime. But there is also a kind of discrimination that is missed: discrimination that is a product of the regime itself. The second question proves tricky. Matters are clear at the extremes. Discrimination based on need is permissible. Discrimination based on race or religion is not. In between, we have a set of hard cases that are more difficult to judge. The article searches for relevant criteria. Finally, on the last question, the article concludes that a political leader could be justified in enacting discrimination as a pragmatic response to political constraints but that, even on such occasions, discrimination remains wrongful.*

All refugees are in need of refuge but not all are treated alike. Some find homes in the safest and richest countries in the world. Many others are trapped in countries neighbouring their own, where conditions are often inadequate. This inequity should trouble us. Why do some refugees fare so much better than others? How are refugees being selected? And which principles should guide such decisions?

One obvious worry about current selection is discrimination. Some refugees, from some social groups, may be systematically advantaged over others. While little has been written within political philosophy on selection and discrimination within refugee policy, there is now a rich philosophical literature on discrimination in general. This article makes use of that literature. By investigating what it means for a distribution to be discriminatory and what makes discrimination wrong, we may hope to gain a better understanding of how the current refugee regime operates and how it should be reformed.

With these goals in mind, the article pursues three questions. To what extent does the current refugee regime discriminate among refugees? When is such discrimination wrong? Could discrimination ever be justified pragmatically, for the sake of admitting more refugees given political constraints?

In answer to the first question, it finds discrimination is rampant. There is the kind of discrimination that gets noticed: discrimination that states choose to enact within the refugee regime. But there is also a kind of discrimination that is missed: discrimination that is a product of the regime itself. The second question proves tricky. Matters are clear at the extremes. Discrimination based on need is permissible.<sup>1</sup>

Discrimination based on race or religion is not. In between, we have a set of hard cases that are more difficult to judge. The article searches for relevant criteria. Finally, on the last question, the article concludes that a political leader could be justified in enacting discrimination as a pragmatic response to political constraints, but that, even on such occasions, the discrimination remains wrongful.

## How Much Discrimination?

To judge the extent of discrimination among refugees, we need first to define ‘discrimination’. The discrimination literature is large, and many definitions are offered. The best approach here is to adopt a definition that is sufficiently wide that it encompasses many others and yet sufficiently narrow that it captures some core features.

The definition I have in mind is treating people worse than others because of their membership of a socially salient group.<sup>2</sup> Socially salient groups are groups whose membership is important to the structure of social interactions across a wide range of social contexts.<sup>3</sup> Standard examples include groups based on gender, race, sexual orientation, nationality, age, disability, and socioeconomic class.<sup>4</sup>

This definition is a nonmoralised conception. It allows us to identify cases as discrimination without prejudging whether the discrimination in question is wrong. Since there seems nothing contradictory in describing something as discriminatory and justified – think of those defending ‘positive discrimination’ – a nonmoralised conception of discrimination makes sense. Of course, discrimination is often wrong and the question of how we identify wrongful discrimination is crucial. I turn to that question in the next section.

Another feature of the definition is that it allows for the possibility of ‘indirect’, as well as ‘direct’, discrimination. Cases of direct discrimination are those we tend to most readily identify such as when a racist shop owner posts a ‘No Blacks’ sign in her window. In such cases, a discriminatory effect is intended. In cases of indirect discrimination, there is a discriminatory effect without a discriminatory intent. So, for instance, in a famous US case, *Griggs v. Duke Power*, an employer’s use of written tests for promotion purposes was held to be discriminatory against African Americans even though the employer was not held to have sought this effect.<sup>5</sup>

But if there is no intention to discriminate, how can we tell when indirect discrimination has occurred? Most definitions of indirect discrimination are moralised. In cases like *Griggs*, the courts asked whether the policy in question (e.g. requiring written tests) is a necessary means to a legitimate end. Such questions concerning the necessity of means and the legitimacy of ends are certainly worth pursuing. I shall pursue such questions in relation to refugee policy below. But recall, we are adopting here a nonmoralised definition of discrimination. On that definition, it is sufficient to show that a policy has the effect of disadvantaging members of a socially salient group to prove discrimination. Judging whether this discrimination is wrong involves a further step.

There is one last point to note concerning the definition: it distinguishes discrimination from other forms of selection. Someone is discriminated against because of their membership of a socially salient group. Someone can be selected against for pretty much any reason.

Imagine a hospital is considering the following policies:

- (A) Give Whites their own room. Put Blacks in wards.
- (B) Give people with short names their own room. Put everyone else in wards.
- (C) Send minor cases to Emergency. Treat urgent cases last.

(A) is directly discriminatory. (B) and (C) are not. Length of name and urgency of medical case are not criteria for membership of socially salient groups.<sup>6</sup> Nor need (B) and (C) have any indirect discriminatory effect. Clearly, however, (B) and (C) are bad policies whether or not they are discriminatory. In fact, (C) is, in some senses, even worse than (A).

Discriminatory selection, then, is just one kind of selection, and a selection policy can be wrong even when it does not discriminate. There is an interesting question to be asked as to why we worry about discrimination at all, separate to selection. Why, for instance, think that (A) is morally distinct from (B)? Other philosophers have sought to answer this question.<sup>7</sup> I will not here. Instead, I will work with the assumption that the concept of discrimination does identify something morally distinctive and, on that basis, continue with our task: determining the prevalence of discrimination among refugees.

If, however, your primary interest is selection not discrimination, read on. This article ranges widely. We will encounter cases of troubling selection as well as discrimination, and, in debating refugee discrimination, we will address the wider question of how refugees should be selected. The aim is to use the topic of discrimination, and its associated literature, to frame our discussion, not constrain it.

We now have a definition of discrimination but something is missing. To find out how frequently states discriminate among refugees, we need a definition of a refugee. The most prominent definition of a refugee can be found in the 1951 Convention Relating to the Status of Refugees. It defines refugees as those who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion' are outside of their country and cannot return. Is this the definition we should adopt?

The question of how we define 'refugee' is, ultimately, a conceptual question, but one way to go about answering it is by asking a normative question: who has a claim to refuge? It seems clear that Convention definition refugees have a claim. It is less clear that they are unique.

Why do Convention definition refugees have a claim to refuge? The most powerful answer is the most obvious: because they are in need. Convention definition refugees are subject to persecution. They need refuge to escape. The refugee regime is there to meet this need.

In offering this answer, we do not exclude others. Perhaps, as one theorist has argued, the refugee regime also operates as a means to condemn persecution.<sup>8</sup> More than one answer is possible. All I insist on is that need is the primary justification for the refugee regime. How do we know this? Because there is no relevant factor that competes in moral importance with the lives and basic wellbeing of refugees. Condemning persecution can be a valuable activity, but people's lives and basic wellbeing matter more.

From this, we can derive an answer as to who has a claim to refuge: people who are in need of refuge because their lives or basic wellbeing are under threat. This is a much simpler and broader definition than the one contained in the Convention. The Convention focusses on only one particular subgroup: those in need of refuge because they suffer persecution for the specified reasons (race, religion, and so forth). Our definition does away with all these stipulations. It covers everyone who is persecuted for any reason and also others: people fleeing generalised violence, natural disasters, climate change, and, perhaps most importantly, extreme poverty. They too are people whose lives and basic wellbeing are under threat.<sup>9</sup>

So do we now have our definition of a refugee? Well, maybe. As noted, one way we can answer the conceptual question (who is a refugee?) is via the normative question (who has a claim to refuge?). On this approach, refugees are all those identified as having a claim to refuge. But there are other plausible approaches. One might, for instance, seek to settle the conceptual question by reference to linguistic convention. On that approach, perhaps the Convention definition might be preferred after all.

In truth, I am uncertain how we should answer the conceptual question, but neither am I much troubled by it. The group that deserves our attention is the one just identified: people in need of refuge because their lives and basic wellbeing are under threat. For the sake of simplicity, I shall refer to them as 'refugees'. If someone wishes to insist that, for some nonmoral reason, we should use the label to refer only to a subgroup of those in need, I have no objection. It is normative, not conceptual, issues that interest me here.<sup>10</sup>

Still, there is one objection to the expanded definition that I need to address. If we so radically change the definition of a refugee, can we still be said to be discussing refugee policy? Refugee policy is often thought of as a relatively discrete issue. There are, we are told, just some 26 million refugees in the world.<sup>11</sup> Refugee specialists spend their time discussing the problems facing this 26 million. But if the new definition is accepted, then there are hundreds of millions of refugees, most of whom suffer poverty not persecution. Having adopted this new definition, it might seem strange to go on discussing refugee policy as if we are talking about the same subject. Indeed, one might wonder if there could be, under this new definition, anything called 'refugee policy' as distinct from, say, 'development'.

In reply, it is certainly true that, on the suggested definition, there are many more refugees. Nevertheless, the underlying subject remains the same. The subject is how states respond to people in need of refuge. Do they admit them, resettle them, return them, or something else. This is the subject of refugee policy under the Convention definition. It remains the subject under the new definition.

But to this, another objection might be made. In the case of poverty, it might be said, refuge is unnecessary. Poverty can be treated at source by means of aid or some similar mechanism. The solution to poverty really does lie in development not refugee policy.<sup>12</sup> Call this the Better Alternatives Argument. We will return to it below. Here, suffice to note that if the argument were successful, the Convention definition would also be in trouble. For sometimes there are better alternatives to protect people against persecution: economic sanctions, military force or some other form of intervention. Persecution, too, can sometimes be treated at source. Even when these alternatives exist, however, people remain refugees under the Convention definition. They only cease to be refugees when the alternatives are successfully pursued. Are better alternatives

always available? Clearly not. Intervention is no magic wand. But the same is true of poverty. Aid is no magic wand either.

In sum, we are not switching the subject when we opt for an expanded definition. Refugees under the expanded definition may be larger in number, but they stand in the same position as Convention definition refugees. All are escaping some peril, one that foreign states have been unable, or unwilling, to address at source. They are asking these foreign states for refuge, and those foreign states must offer some kind of response. What response do they give? What response should they give? That is our subject.

Of course, to insist that we are still talking about the same subject is not to deny that the revised definition has significant implications for refugee policy. It does, as will soon become clear.

We now have a definition of discrimination and at least a working definition of 'refugee'. We can now answer our first question: are refugees subject to discrimination? Refugees are subject to two kinds of discrimination: that which occurs within the refugee regime and that which is produced by the regime itself. The former kind of discrimination attracts attention. The latter is overlooked. And yet, of the two, the second kind of discrimination has more profound effects.

To see all this, note something important about the refugee regime: unless states exceed their Convention obligations, they exercise surprisingly little choice over whom they protect. The core obligation is nonrefoulement. States cannot send refugees back to where they could be persecuted. States impose entry restrictions, trying to prevent outsiders from ever reaching their territory, but once refugees reach their territory, it is hard to expel them. The only way states could abide by the principle of nonrefoulement and expel refugees is by finding a safe third country willing to accept them. This is rare. States that abide by the principle of nonrefoulement thus have limited choice over whom to protect. With limited choice, comes limited opportunity to discriminate.

Now, states could exercise much greater choice were they to accept additional refugees. They could lower entry restrictions or engage in resettlement programs of the kind organised by the United Nations High Commissioner for Refugees (UNHCR). Sometimes states do accept additional refugees, but the numbers remain small. In the case of resettlement, for instance, only 92,400 were resettled in 2018, out of a total of 25.9 million Convention definition refugees.<sup>13</sup>

Still, it is worth asking, when states do accept additional refugees, do they do so on a discriminatory basis? The answer is 'yes'. When the UNHCR selects people for resettlement, for instance, it identifies categories it deems most in need. The list is as follows: those under threat of refoulement, those with legal or physical protection needs (including ethnic minorities, homosexuals, and transsexuals), survivors of violence and torture, those with medical needs, women and girls at risk, children and adolescents at risk, those who are cut off from family, and those without any other prospect of a secure future.<sup>14</sup> Since this approach disadvantages certain socially salient groups, it counts as discrimination under the above definition but, as I argue below, it is, for the most part, legitimate.

More troubling is the criteria for resettlement that some states have chosen to add to the list. Canada, for instance, insists that all applicants, except the most desperate cases, must demonstrate the ability to establish in Canada. To judge whether this requirement is fulfilled, 'factors such as education, presence of a support network



(family or sponsor) in Canada, work experience and qualifications, ability to learn to speak English or French and other personal suitability factors such as resourcefulness' are assessed.<sup>15</sup> This is not direct discrimination since there seems no attempt to advantage particular socially salient groups over others. That said, the policy is likely to have an indirectly discriminatory effect. Some nationalities and socioeconomic classes better fit the criteria than others.<sup>16</sup>

Finally, there are cases of direct discrimination. According to the Refugee Council of Australia, for instance, the Australian government is 'cherry picking' Christian and other non-Muslim Middle Eastern refugees in its refugee resettlement program.<sup>17</sup> More generally, many states – including those, like the United Kingdom, that rarely resettle – have, at times, established special quotas for certain nationalities such as Hungarians (during the Soviet invasion), Kosovans (during the Kosovo war), and Syrians (the recent conflict).

We have considered cases of discrimination within the refugee regime. What about discrimination that the regime itself produces? There are two features of the regime that have a discriminatory effect. The first is the restriction of protection to Convention definition refugees. People fleeing generalised violence, natural disasters, and climate change have no claim. Most significantly, it excludes the many millions of people living in desperate poverty. The primary justification for the refugee regime, we found, is to protect people in need, and yet, the majority of people in need are excluded. Let us call this first feature of the refugee regime, the 'persecution requirement'.

Second, since the Convention includes the duty of nonrefoulement but no duty to admit refugees, it effectively selects refugees based on mobility. Those able to travel can seek asylum. Those less mobile cannot. Indeed, even among those refugees able to seek asylum *somewhere*, there remains significant inequalities. Some receiving states are much better destinations than others. Not only do different states offer vastly different living standards, they also differ in their refugee recognition rates. For instance, in 2016 Germany granted asylum to 70% of Iraqi applicants; Hungary just 30%. Switzerland granted asylum to 89.4% of Afghans; Norway 30%.<sup>18</sup> Refugees are thus greatly advantaged if they can exercise some control over their destination. Call this second feature, 'mobility bias'.

Because of the persecution requirement and mobility bias, the refugee regime has differential effects on different people in need. This constitutes a troubling form of selection, but does it involve discrimination? Yes. Certain socially salient groups are indirectly discriminated against. The persecution requirement, for instance, indirectly discriminates against people in lower socioeconomic classes. These people endure the most extreme forms of poverty, yet because of the persecution requirement, they are unable to claim refuge on this grounds. They can only claim refuge if they happen to also be persecuted.

To see the discriminatory effect of mobility bias, consider the demographics of Syrian refugees living in neighbouring countries, compared to people reaching Europe via the Mediterranean. In neighbouring countries, there is a roughly equal split in terms of gender (52.7% are male; 47.3% female) and large numbers of children (48.2%).<sup>19</sup> Among those reaching Europe, men predominate (67.6%),<sup>20</sup> the educated are over-represented,<sup>21</sup> and while health and disability statistics are harder to find, it seems unlikely that the sick and disabled are reaching Europe in proportionate numbers. In

short, the current refugee regime is biased towards the mobile, and the mobile tend to be more privileged. The most vulnerable are disproportionately excluded.

### When Is Refugee Discrimination Wrong?

Just as scholars disagree over how we should define discrimination, they also disagree over when it is wrong. Among the various accounts, we can discern three families.

First, there are accounts that locate the wrong of discrimination in *wrongful distribution*. They claim that resources should be distributed according to certain principles and condemn discrimination that violates those principles.<sup>22</sup> In the case of employment, the relevant principle might be said to be merit or equal opportunity. In the case of refugee policy, the most obvious candidate is need.

Second, there are accounts that locate the wrong of discrimination in *wrongful motivation*. On this view, discrimination is wrong when certain thoughts, intentions, or biases are present in the mind of the discriminator.<sup>23</sup> The most obvious examples are cases of direct discrimination: the racist shop keeper with a 'No Blacks' sign. The account has a harder time explaining how indirect discrimination could be wrong.

Third, there are accounts that locate the wrong of discrimination in *wrongful expression*. On this view, discrimination expresses a view about the people subjected to it. Discrimination is wrongful when it communicates disdain: the idea that members of a group lack equal moral worth. How do we know that disdain is expressed? Meaning is set by context. In certain contexts, discrimination can express disdain even when it is innocently motivated. For instance, in a racist society, a school that uses race in its rules and regulations – 'White children will enter the dining hall first, then Black' – could express disdain even if the sole motivation is to keep good order.<sup>24</sup>

In what follows, I will not attempt to choose between these three accounts. Instead, I shall draw on all three to judge the discrimination refugees face. To my mind, all three accounts seem plausible. Moreover, they need not be deemed mutually exclusive. Discrimination can be wrong for several reasons.

One last point to flag: despite the plausibility of these accounts, they are not easy to apply. The motivation and expression accounts are particularly tricky. To apply the motivation account, we must discern a discriminator's true motivations. To apply the expression account, we must understand the context in which the discrimination occurs and, from it, deduce meaning. While I think there are cases in which we can make reasonable estimations as to what motivates discrimination and what it expresses, they tend to be ones in which there is widespread animosity towards a certain group. Absent widespread animosity, wrongful motivation and expression are harder to detect.

Consider five examples of discrimination we have encountered so far:

Within the refugee regime:

- (1) The UNHCR's need-based selection criteria for resettlement.
- (2) Canada's ability to establish principle.
- (3) Australian cherry picking of Christian and other non-Muslim Middle Eastern refugees.



Products of the refugee regime itself:

- (4) The persecution requirement.
- (5) Mobility bias.

In what follows, I wish to consider each of these examples to determine their ethical status. Of the five, I will have the most to say about the second one, not because I think it is the most important, but because, as it turns out, it is the most philosophically complex.

Let us start with the most benign case: UNHCR's need-based selection for resettlement. We established that the primary reason for the refugee regime is alleviating need, and so an attempt to select on need makes sense. Moreover, it would be hard to claim that need-based selection is motivated by prejudice or expresses disdain. So, none of the three objections to discrimination seem to apply in this case.

This does not mean the UNHCR has it exactly right. Selecting on need is more complex than it may first appear. It might not be the same as simply selecting the neediest. Think, for instance, of a refugee with a debilitating disease that is expensive to treat and impossible to cure. She might be among the neediest, but benefit little from selection. She will also consume resources that could have gone to alleviating the needs of others. Selecting her will do little to reduce need overall. There are then three factors relevant to need: (1) the extent of a person's need, (2) the extent to which her need can be alleviated, and (3) the cost of alleviation. One way to cover them all is to accord weighted, but not absolute, priority to the worst off. This, in my view, is the principle we should not adopt, but I will not argue for it here.

On the whole, the UNHCR's selection criteria seem designed to track (1) with little attention given to (2) or (3). The categories on the UNHCR list are refugees with significant needs. There is no category for 'people who would most benefit from resettlement' or 'the cheapest to help'. The only instance where anything else is taken into account is in relation to medical needs. Sick refugees are assessed for their prospects for improvement as well as the severity of their condition.<sup>25</sup>

A second issue is how the needy are identified. Some of the UNHCR's categories are defined solely by their needs, but in other cases, proxies are used. There is, for instance, a category for 'women and girls at risk' rather than simply 'people at risk'. One can see how proxies could prove attractive. If we know that many women and girls suffer hidden forms of abuse, we might decide to use gender as a proxy for need. After all, a person's gender is, in most cases, evident. Hidden abuse is not. Nevertheless, the use of proxies does raise concerns. We should always worry whether a more direct measure would prove more accurate. We should also worry if their use reinforces certain stereotypes or expresses disrespect in some other way.

There are then various details to be hashed out when we select on need. Nevertheless, on a spectrum of different ways to select refugees, the UNHCR case remains at the justified end. At the other end lies the Australian case. Cherry picking Christians is an unacceptable form of discrimination no matter which account we adopt. There might be cases where religion could be used as a proxy for need, but this is not one of them. There is no evidence that Christians are in greater need. So, cherry picking is unacceptable according to the distribution account. It is also unacceptable according to the motivation account, since while motive is always difficult to assess, it is hard to

believe that anti-Muslim prejudice was not playing a role here. Finally, it would be reasonable for Muslim refugees, and perhaps Muslims more generally, to feel that cherry picking expresses disdain towards them.

Lest this condemnation of Australian-style cherry picking appear too quick, let me consider one possible defence. This defence draws a distinction between mandatory and discretionary refugee admissions. Most normative accounts make a distinction of this sort, tying the duty to admit to the costs of assisting people in need. Below some cost threshold, states must do more to assist people in need, admitting people as refugees if they cannot, or will not, assist them by other means. Such admissions are mandatory. Above the cost threshold, however, further assistance is supererogatory and further admissions discretionary. Where precisely this cost threshold lies is disputed,<sup>26</sup> but the important point is that, on a range of theories, this distinction between mandatory and discretionary admissions arises.

The defence I wish to consider holds that discrimination can only be wrong among mandatory admissions. When it comes to discretionary admissions, any selection criteria is permitted. In his treatment of migration, Michael Walzer adopts something like this view. On Walzer's view, states are required to admit refugees when the costs are low. When the costs are higher, states can admit based on preferences and affinities. Walzer argues, for instance, that western states were permitted to admit Hungarians in 1956 for purely ideological reasons. As he puts it, 'there is a lot of room here for political choice'.<sup>27</sup>

In a separate and, by now, notorious, passage, Walzer seems willing to permit even racial discrimination. Addressing the example of White Australia – the Australian government's once race-based immigration policy – Walzer finds nothing to criticise except the size of Australia's territorial claim. As Walzer sees it, the problem with White Australia was not its racism but its attempt to exclude needy people from such a large area. Since Australia had space, admissions were mandatory. Had Australia been smaller, admissions would have been discretionary. 'White Australia could survive only as Little Australia'.<sup>28</sup>

If one is uncomfortable with Walzer's treatment of White Australia, it is with good reason. There is an important philosophical lesson to be learned here, one that forms the basis of my reply to the above defence: discrimination can be objectionable even when admissions are discretionary. Even if Australia had not been required to admit more migrants, it should not have discriminated on racial grounds. The point generalises. Shop owners need not admit customers, but they cannot admit Whites while refusing Blacks. An employer is not required to employ more staff, but, if she does, she cannot ban homosexuals from applying. A good may be discretionary and still discrimination can be wrong.

Once one considers these examples, the point seems obvious. So why would Walzer, or anyone else, be tempted by the opposite view? The answer, I think, is that talk of 'discretionary' can easily confuse. We are tempted to think of the realm of the discretionary as a morality-free zone. Once you have crossed the cost threshold, you can do whatever you like. In fact, matters are more complex. It can be discretionary to  $\Phi$  and yet obligatory, if one chooses to  $\Phi$ , to do so in one way rather than another. Even above the cost threshold, one is never entirely free from moral constraints.<sup>29</sup>

Does this mean that the idea of discretionary admissions is completely irrelevant to refugee discrimination? Actually, no. Hold on to it. It will prove relevant below.

If the UNHCR case lies at one end and the Australian at the other, the Canadian lies somewhere in between. There are good reasons why Canada would want to include an ability to establish requirement, rather than selecting purely on need. While states should be neutral in religious matters, they need not be neutral in socio-economic matters. Canada has a legitimate interest in maintaining a dynamic economy and cohesive society. Ability to establish can help Canada maximise the benefits, and minimise the costs, of resettling refugees.

There is an obvious problem, however. Some refugees are in greater need than others and there is no reason to expect that those most in need will score best in terms of ability to establish. On the contrary, many refugees will score poorly precisely because they have significant needs.

Ability to establish, then, is in tension with selecting the neediest. Interestingly, it does better in terms of another criterion: selecting refugees who can benefit most from resettlement. Refugees that arrive with the relevant skills, languages, and contacts will, other things equal, benefit more from resettlement than those without. And, as indicated above, extent of benefit does seem relevant to refugee selection. Nevertheless, even in regards to this second criterion, ability to establish is no perfect fit. To see this, imagine a receiving state is deciding which of two refugees to resettle, A or B. A is an unskilled worker with a painful medical condition that is treatable post resettlement. B is a skilled worker already in full health. All else equal, B is better able to demonstrate ability to establish, yet A has the most to gain. The moral of this story is that there are important ways by which refugees can benefit from resettlement that are not captured by ability to establish. If one were trying to identify the refugees who could benefit the most, one might include some of the criteria included under ability to establish, but one would not make ability to establish a separate requirement. Making it a separate requirement means selecting the Bs over the As.

In any case, Canada is not trying to select the refugees who can benefit the most from resettlement. It is trying to save net costs. In what follows, I will evaluate the ethics of ability to establish as a cost-saving policy.

There are two objections to consider. The most obvious, and the one I will consider at length, is that ability to establish wrongs refugees. But there is another possibility worth noting: ability to establish might wrong other states. The thought here is that if a resettling state selects the best resourced refugees, it leaves other states to care for the rest. These other states may be other resettling states or (more likely, given low resettlement rates) neighbouring states from which refugees are resettled. It is relevant that neighbouring states are often poor and yet host larger numbers of refugees than richer states. One aim of resettlement is to redress that imbalance, but selection on ability to establish seems to run counter to that objective.

That ability to establish may wrong other states is, I think, an important objection, but it will not always succeed. For one thing, not all skills are in universal demand. Fluency in French, for instance, is highly valuable to some states but not many.<sup>30</sup> For another, many states prevent refugees from working. States that leave doctors and engineers to languish in refugee camps can hardly complain against their resettlement. Putting these points together, we find that selecting on ability to establish will only harm other states if the states that would have otherwise hosted the refugees would have benefitted from their skills. There is no interstate wrong when those skills are location specific or would otherwise go to waste.

Let us turn to the objection that ability to establish wrongs refugees. Here we need to make two distinctions. First, since ability to establish saves net costs, we need to distinguish two ways the savings might be used. The most obvious use is to benefit the resettling state, allowing it to cut taxes and/or increase services for its citizens. But another use would be to assist more people in need. States could, for instance, spend more on aid or resettle more refugees. Here we return to another idea noted above: the cost of assistance can be relevant to need. When what is saved by selecting for ability to establish is ploughed back into assisting more people in need, ability to establish and need-based selection begin to merge.<sup>31</sup>

The second distinction is between two factors that ability to establish tracks: gross cost and contribution. Each refugee costs a receiving state a certain sum and contributes something back. Subtract gross cost from contribution and you get net cost. In the case of many refugees, contribution outstrips gross cost, making them net contributors.<sup>32</sup> Ability to establish tracks both gross cost and contribution without distinguishing between them. It need not be this way. One could select for gross cost without selecting for contribution. For instance, one could select against a refugee for her high medical costs but not for her lack of skills.

With these distinctions in place, I shall make two claims. First, states that select for ability to establish, but have not yet fulfilled their duties of assistance, must spend what they save on assisting people in need. Recall that the consensus view is that state duties towards those in need is limited by a cost threshold. States must continue to assist people in need until the threshold is reached. When a state selects for ability to establish, the cost of admitting refugees falls, but the cost threshold remains the same. So, states cannot simply admit fewer refugees and pocket the change. They are obliged to spend more on assistance. This is true no matter where we set the cost threshold, high or low.

It is only when a state reaches the cost threshold that it can apply ability to establish for its own good rather than others. Here then discretionary admissions really are morally distinct. States can apply ability to establish when selecting for discretionary admissions and spend the resulting savings on themselves.

Let me turn to my second claim: states are prohibited from selecting for contribution; they can only select for gross costs. This is true whether or not states spend what they save on assisting people in need and whether or not states have fulfilled their duty of assistance. Contribution is a prohibited criterion for selection.

To see this, consider others services assisting people in need. Take healthcare. When we distribute healthcare, we may consider gross costs. If someone has a condition that is expensive to treat, then we, as a society, might permissibly deny them treatment. It is unacceptable, however, to consider contribution. A skilled person who has a lethal or painful condition should not be awarded treatment over an unskilled person with the same condition. This is true even if the skilled person can contribute more through work and taxation.

The same principle applies to other emergency services such as firefighters. Because of the higher gross cost of reaching rural areas, rural inhabitants receive less protection than city dwellers. This seems permissible. But it would be impermissible to protect areas where skilled people live better than areas where unskilled people live. Gross costs count; net costs should not.

There is then, in cases of need, a ban on selecting for contribution. But why should this be? We have here a genuine philosophical puzzle, one we might term the 'Contribution Puzzle'.<sup>33</sup> In other spheres of life, a refusal to consider net costs would be illogical. Economies only function because people accept certain costs to gain certain benefits. If consumers and investors only considered gross costs and ignored net costs, they would never consume nor invest. To obsess over gross costs would, ordinarily, display a form of fetishism. So why should need alleviation be any different?

I have no fully worked-out solution to the Contribution Puzzle, but I do have some thoughts. One suggestion that may initially seem plausible is the ban on selecting for contribution is there to prevent indirect class discrimination. There is a relationship between skills and class. The highly skilled tend to be privileged. The low skilled tend to be working class. Selecting for contribution will thus tend to benefit the privileged over the working class. Call this the 'Class Solution'.

The Class Solution quickly encounters problems, however. One problem is that it is unclear why indirect class discrimination should be more troubling than selection based on gross cost. Class discrimination is unfair. People are rarely responsible for their class background. But so too with gross costs. People are rarely responsible for needs that are expensive to alleviate. A further problem is that selection for gross costs might also involve indirect class discrimination. It is likely that people with expensive needs to alleviate are disproportionately working class. If so, a prohibition on class discrimination cannot explain why gross costs could be considered but not contribution. To be successful, a solution to the Contribution Puzzle must be able to explain this asymmetry.

A more promising solution to the Contribution Puzzle has been offered in the bioethics literature. According to this solution, selection for contribution violates the Kantian principle that people should never treat others merely as a means. When one fulfils a person's needs because she is in need, one treats her as an end in herself. When one will only fulfil a person's needs to realise some social benefit, one treats her as a means to realise that benefit. Call this the 'Kantian Solution'.<sup>34</sup>

Unlike the Class Solution, the Kantian Solution can explain the asymmetry between gross costs and contribution. Selection for gross cost does not involve treating anyone as a means. People are either helped or not helped. No one is assessed for their usefulness to others. Only selection for contribution could be said to do that.

The problem with the Kantian Solution, however, is that the principle it refers us to is frustratingly opaque. What exactly does it mean to treat someone merely as a means? We treat others as a means all the time, when we pay them to cut our hair, fix our car, teach our children or perform any other service. No doubt it will be said that treating people as a means is fine, but treating *merely* as a means is not. But that, in itself, does not get us very far without a method to distinguish the two.

It might be suggested that merely-as-a-means cases are those in which people are used without *any* regard for their welfare. That seems plausible too, but, on that definition, selection for contribution need not be problematic. A state can select for contribution and still have regard for the welfare of those in need. Refugee resettlement is a case in point. A state that applies selection for contribution within a refugee resettlement program is expressing at least some regard for refugees, including those selected against, by having a resettlement program in the first place. After all, a purely selfish

state would presumably select for contribution among immigrants in general, making no special arrangement for refugees.

Where do these reflections leave us? Well, unfortunately, still in search of a solution to the Contribution Puzzle. Let me then make one final suggestion. Perhaps the wrong of selection for contribution lies in what it expresses about those selected against. We draw here upon the expression account of wrongful discrimination. That account concerns the meanings that actions and policies express. When what is expressed is that some group of people are of lesser moral worth, we have reason to object to the action or policy.

But what does selection for contribution express about the people selected against? Meanings are set by context. In the context of modern societies, two features stand out. First, significant emphasis is placed on contribution, and contribution is often tied to the idea of desert. Many people think that those who contribute more deserve to receive more. There is often hostility towards those who contribute less. Phrases like ‘sponger’, ‘scrounger’, and ‘welfare queen’ bring this out. In this context, when the state selects for contribution, a natural interpretation is that the government views greater contributors as deserving of the benefits and lesser contributors as deserving of the costs. Second, in cases of need, such as healthcare and resettlement, the costs are significant. Those excluded suffer pain, hardship, and even death.

Given these two features, a reasonable interpretation of selection for contribution in cases of need is that it expresses disdain for those selected against: that they are of lesser moral worth or even deserve to suffer. This may not be the expression that the government wishes to convey. Perhaps all the government wants to do is limit costs. But the government does not have complete control over the meanings its policies convey. So much is determined by context. Selection for contribution can express disdain even if no disdain is intended.

Call this proposed solution to the Contribution Puzzle, the ‘Disdain Solution’. Like the Kantian Solution, the Disdain Solution can explain the asymmetry between gross costs and contribution. Modern societies rarely tie gross costs to notions of desert. If someone has a condition that is expensive to treat, few, if any, would say they deserve their fate. Perhaps what is going on here is that people tend to treat gross costs as external to the person and thus not reflective of their worth or character. Someone’s contribution, however, is often taken to be indicative of whom the person is and how deserving they are.

What the Disdain Solution offers, over the Kantian Solution, is a clearer explanation as to how selection for contribution contravenes the relevant moral principle. The fact that the Disdain Solution is sensitive to context helps in this regard. When all we have is an abstract moral principle – don’t treat others merely as a means – it can be hard to apply to the real world. In the case of disdain, we have more than an abstract moral principle. We have a social context to help us to determine whether the relevant moral principle is in fact contravened.

One final point: since the Disdain Solution is context dependent, it is also contingent. Given relevant changes in social attitudes, selection for contribution would not express disdain. Is this contingency a problem? I do not think so. States have good reason to select for contribution. It allows them to address people’s needs at a lower net cost. It would not be surprising if, in a world that took a kinder view of lesser contributors, selection for contribution might prove acceptable after all.



I have said enough regarding the morality of discrimination within the refugee regime. Let us turn to discrimination resulting from the regime itself. As we have seen, two features of the refugee regime, the persecution requirement and mobility bias, cause discrimination. Is this discrimination wrongful?

On either the motivation or expression accounts, it is hard to see what is wrong with the discrimination in question. The particular groups who are discriminated against do not appear to be subject to widespread animosity. Indeed, one oddity of mobility bias, in particular, is that it discriminates against refugees who arouse the most public sympathy (women, children, the old, and the sick) and in favour of a group that is often demonised (young foreign men). In the absence of animosity, wrongful motivation or expression is hard to detect.

The distribution account, however, can condemn the discrimination in question. Both the persecution requirement and mobility bias violate the relevant distributive principle: need. The persecution requirement violates need by denying refuge to those in need for reasons other than persecution. Some of these people are in the greatest need of all. Mobility bias is even more pernicious. It does not merely fail to track need; it runs counter to it. The effects of mobility bias resemble the above example of a hospital that sends minor cases to Emergency and treats urgent cases last. No rational person would run a hospital this way. There is no good reason to run the refugee regime this way either.

Some might seek to defend mobility bias as a proxy for contribution. Those with the resources to travel might be expected to contribute more to receiving states. But, as we have seen, *direct* selection for contribution is hard to justify. Selection by mobility as a means of *indirect* selection seems even less promising. International migration should not be an exercise of social Darwinism, throwing obstacles in people's paths to filter out the weak.

But perhaps the current regime could be defended by reference to a different value: the value of assisting people in or near their homes. People should not have to migrate across continents to have their needs addressed. It is much better if they receive assistance closer to home. Here we return to something like the Better Alternatives Argument we encountered above: the argument that the poor have no claim to refuge since it is better to address poverty at source. If the argument worked, it might be able to justify the persecution requirement, and, note, a similar justification could be given for mobility bias. While migration restrictions prevent the less mobile from reaching the most desired destinations, arguably, the solution to that inequity is to pursue regional solutions. These regional solutions would improve conditions within neighbouring states so that refugees could stay there rather than needing to engage in onward migration.<sup>35</sup>

The Better Alternatives Argument fails, however. It is true that sometimes overseas aid and regional solutions are better alternatives, but it is false to think that the potentiality for such alternatives provides any defence of the current regime. Take the persecution requirement. The possibility that someone currently living in poverty *could be* assisted in their home country, does not, in any way, undermine their claim to refuge when, *in the real world*, that assistance is lacking. The strength of claims to refuge is determined by reality not potentiality. We acknowledge this in the case of Convention-definition refugees when we offer protection to people who could have been assisted by other means (some form of intervention) but never were. In the case of

both poverty and persecution, the failure to pursue better alternatives could itself be wrong, but states do not right that wrong – they only exacerbate it – when they fail to offer refuge to those forced to flee.<sup>36</sup>

Much the same point applies to mobility bias. Yes, regional solutions might be preferable, but they need to be in place before restrictions can be justified. As things stand, conditions in neighbouring states are often inadequate. For as long as they are inadequate, refugees have a right to refuge elsewhere.

So what should states do? Here are two suggestions. First, they should drop the persecution requirement. Refugees should be granted refuge based on need not on what caused them to be in need. Second, as well as pursuing regional solutions, richer states must tackle mobility bias by resettling and admitting more refugees from elsewhere. With greater resettlement and admission, need would begin to replace mobility as the primary principle of distribution.

### Pragmatic Discrimination

This article has sought to discern the types of discrimination that refugees are subject to and whether that discrimination is wrongful. There is one last matter to be addressed: whether seemingly wrongful discrimination could nevertheless be justified as a response to political constraints. We can imagine situations where citizen opposition makes it impossible for political leaders to admit refugees based solely on need. If these leaders want to admit more refugees, they must pick those who inspire greater public acceptance. A justification of this sort could potentially be offered for the Canadian ability to establish principle or even Australian cherry picking of Christian refugees. Given political constraints, permitting discrimination might seem like the pragmatic thing to do.

The argument for what we might term ‘pragmatic discrimination’ is not implausible, but it needs to be properly understood. We must be clear as to whose actions the argument could justify and whose it could not. Let us distinguish three agents: political leaders, citizens, and states. The argument might justify the actions of political leaders, but it could never do so for citizens. If, as I have argued, states should admit refugees based on need, citizens should support that policy. If citizens oppose it, they act wrongfully.

Since, we are supposing, citizens act wrongfully, pragmatic discrimination that responds to that wrong is wrongful itself. To see this, consider an analogy. Suppose Thug forces Bystander to choose between either beating or killing Victim. To minimise harm, Bystander chooses to beat Victim. Arguably, Bystander is justified in making this choice but clearly the beating remains wrongful. In this case, and the case of refugees, the same reasoning applies: if one agent constrains another, forcing her to choose between a set of wrongful options then, although the chooser may be justified in choosing as she chooses, the result remains wrongful.

Having considered political leaders and citizens, what about states? One might think that if political leaders are justified in enacting pragmatic discrimination, so too are states. On this view, questions concerning the justifiability of state behaviour can be settled by judgements regarding how political leaders behave. If a political leader behaves justifiably, so too does the state. This is not my view, however. States are

more than their political leadership. Citizens are both members of the state and exercise power over it. When the state's citizens – or a large proportion of them – wrongfully constrain the set of options available to political leaders, the state itself is implicated in that wrong. States that engage in pragmatic discrimination act wrongfully even when their political leaders do not.

The general principle here is that an agent can only cite constraints set by others to justify its own behaviour if there is a certain distance between the agent and the others setting the constraints. Such distance can exist between political leaders and citizens, but there is no similar distance between a state and its citizens.

A final question: are political leaders always justified in enacting pragmatic discrimination? No. For one thing, the argument for pragmatic discrimination only works if the options of political leaders really are constrained. If political leaders can, by changing their speech and behaviour, convince their citizens to support needs-based admissions, the case for pragmatic discrimination fails. Again, the analogy proves helpful: Bystander is not justified in beating Victim if, in fact, Bystander could talk Thug into letting her go.

Even assuming that political leaders lack power over their citizens, the argument for pragmatic discrimination remains incomplete. Here a different analogy proves useful, this time with a real case. In 1998, a patient in a British hospital offered to donate his organs on condition that they only be transplanted to White people. The hospital accepted the offer, transplanting the organs to two White patients. The incident caused a public furore, and a subsequent government report condemned the hospital's actions.<sup>37</sup>

Let us assume, for the sake of argument, that the hospital's decision saved two lives that would not have otherwise been saved. Still, I think the government was probably right to condemn its behaviour. Racial discrimination is such a profound wrong that it is better to allow some people to die than to be complicit. This judgement is perhaps best explained on the expression account. By transplanting the organs on the basis of race, the hospital could reasonably be perceived as expressing disdain for non-White people. This is so, even if the hospital's sole motivation was to save lives.

I do not wish to draw too strong a conclusion from this one organ case. There may be various differences between this case and the case of refugees that prove relevant, and even in the case of organs, numbers matter. Our sense that the hospital made the wrong decision might be influenced by the comparatively low numbers of beneficiaries. Things might be different were millions of lives at stake. What the case does help to show, however, is that we must avoid quick conclusions. The case for pragmatic discrimination depends on the wrong-doing of others. This, to my mind, should make us reluctant to enact it. A political leader might be able to increase admissions by discriminating, but that does necessarily mean she should.

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## NOTES

- 1 Is discrimination based on need even discrimination? Yes, on the definition I adopt; see below.
- 2 Kasper Lippert-Rasmussen, *Born Free and Equal? A Philosophical Inquiry into the Nature of Discrimination* (Oxford: Oxford University Press, 2014); Andrew Altman, 'Discrimination', *Stanford Encyclopedia of Philosophy*, (2016).
- 3 Lippert-Rasmussen, *op. cit.*, p. 30.
- 4 When it comes to socioeconomic class, we tend to judge a person's status in relation to domestic hierarchies, but we could also consider global hierarchies. A person in a poor country receiving that country's median salary might be judged both middle class (domestic hierarchy) and part of the global poor (global hierarchy). For the purposes of this article, I leave these complications aside. People who belong to lower socioeconomic classes in poor countries are at the bottom whichever hierarchy we choose. It is the plight of these people at the bottom that I focus on below.
- 5 Altman, *op. cit.*
- 6 At least not in any society of which I am aware. Perhaps people with certain medical conditions might be said to constitute socially salient groups, but having a medical condition is not the same as needing urgent treatment.
- 7 See, for instance, Cass R Sunstein, 'The Anti-Caste Principle', *Michigan Law Review*, 92, (1994): 2410–2455; Deborah Hellman, *When is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008).
- 8 Matthew Price, *Rethinking Asylum: History, Purpose, and Limits* (Cambridge: Cambridge University Press, 2009).
- 9 I am not the first, of course, to suggest a more expansive definition. The classic in this field is Andrew E. Shacknove, 'Who Is a refugee?', *Ethics*, 95, 2, (1985): 274–284.
- 10 See relatedly Kieran Oberman, 'Reality for realists: Why economic migrants should not just "go home and wait for assistance"', *European Political Science*, 17, (2018): 658–661.
- 11 UNHCR, 2020, <https://www.unhcr.org/ph/figures-at-a-glance>. (Accessed: January 24 2020).
- 12 Max Cherem, 'Refugee rights: Against expanding the definition of a 'refugee' and unilateral protection elsewhere', *Journal of Political Philosophy*, 24, 2, (2016): 183–205; Matthew Lister, 'Who are refugees?', *Law and Philosophy*, 32, 5, (2013): 645–671.
- 13 UNHCR, *op. cit.*
- 14 UNHCR, *UNHCR Resettlement Handbook* (Geneva: UNHCR, 2011), pp. 243–296.
- 15 UNHCR, 'Country Chapter CAN: Canada, by the Government of Canada' *UNHCR Resettlement Handbook*, (Geneva: UNHCR, 2013), p. 5.
- 16 Another feature of Canadian refugee system that may have an indirect discriminatory effect is private sponsorship. I shall not address that issue here, but for excellent discussion, see Patti Tamara Lenard's article 'The Ethics of Citizen Selection of Refugees for Admission and Resettlement' included in this symposium.
- 17 Sophie McNeill, 'Refugee Council Accuses Australia of 'Cherry Picking' Syrian Refugees for Resettlement', *ABC News*, March 31. Available at: <http://www.abc.net.au/news/2016-03-31/australia-cherry-picking-syrian-refugees-says-refugee-council/7289918>. (Accessed: April 11 2018).
- 18 Asylum Information Database, 2017, <http://www.asylumineurope.org/news/23-05-2017/asylum-statistics-2016-sharper-inequalities-and-persisting-asylum-lottery>. (Accessed: April 14 2018).
- 19 UNHCR, 2018, <http://data2.unhcr.org/en/situations/mediterranean>. (Accessed: May 7 2018).
- 20 UNHCR, 2018, *op. cit.*

- 21 Paul Collier and Alexander Betts, *Refuge* (United Kingdom: Penguin Books, 2017), p. 199.
- 22 Richard Arneson, 'Discrimination, disparate impact, and theories of justice' *Philosophical Foundations of Discrimination Law*, (Oxford: Oxford University Press, 2013); Lippert-Rasmussen, op. cit.
- 23 John Hart Ely, *Democracy and Distrust* (Cambridge, MA: Harvard University Press, 1980), pp. 53–59.
- 24 Hellman, op. cit.
- 25 UNHCR 2011, op. cit., p. 257.
- 26 Compare Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983), pp. 31–52; Peter Singer and Renata Singer, 'The ethics of refugee policy', in Mark Gibney (ed.) *Open Borders? Closed Societies?*, (Westpoint, CT: Greenwood Press, 1988).
- 27 Walzer, op. cit., p. 50.
- 28 Walzer, op. cit., p. 47.
- 29 A point well illustrated in Theron Pummer, 'Whether and Where to Give', *Philosophy & Public Affairs*, 44, 1, (2016): 77–95.
- 30 David Miller, 'Selecting refugees', in David Miller and Christine Straehle (eds.) *The Political Philosophy of Refuge*, (Cambridge: Cambridge University Press, 2019), p. 109.
- 31 Recall that need-based selection is not the same as selecting the neediest. Selection on cost so as to assist more people in need can also form part of need-based selection.
- 32 While I will not labour the point here, the fact that refugees are typically net contributors has important ethical implications; see Kieran Oberman, 'Border Rescue', in Christine Straehle and David Miller (eds.) *The Political Philosophy of Refuge*, (Cambridge: Cambridge University Press, 2019), pp. 92–93. I thank Serena Parekh for bringing my attention to this point.
- 33 I am not the first to note a puzzle of this kind. For a survey of relevant literature, see Dan W. Brock, 'Separate spheres and indirect benefits', *Cost Effectiveness and Resource Allocation*, 1, 1, (2003): 1–12.
- 34 F.M. Kamm, *Morality, Morality. Volume 1: Death and Whom to Save from It?* (New York, NY: Oxford University Press, 2010), pp. 125–127.
- 35 Collier and Betts, op. cit.
- 36 One way of putting this point is that states have a primary duty to assist people *in situ*, when they can reasonably do so, and a secondary duty to admit people as refugees if they fail to do so. See Kieran Oberman, 'Poverty and immigration policy', *American Political Science Review*, 109, 2, (2015): 239–251.
- 37 BBC News, 'Racist Organ Donation Condemned', *BBC News*, February 24. Available at: <http://news.bbc.co.uk/1/hi/health/652132.stm>. (Accessed: 19 June 2019).